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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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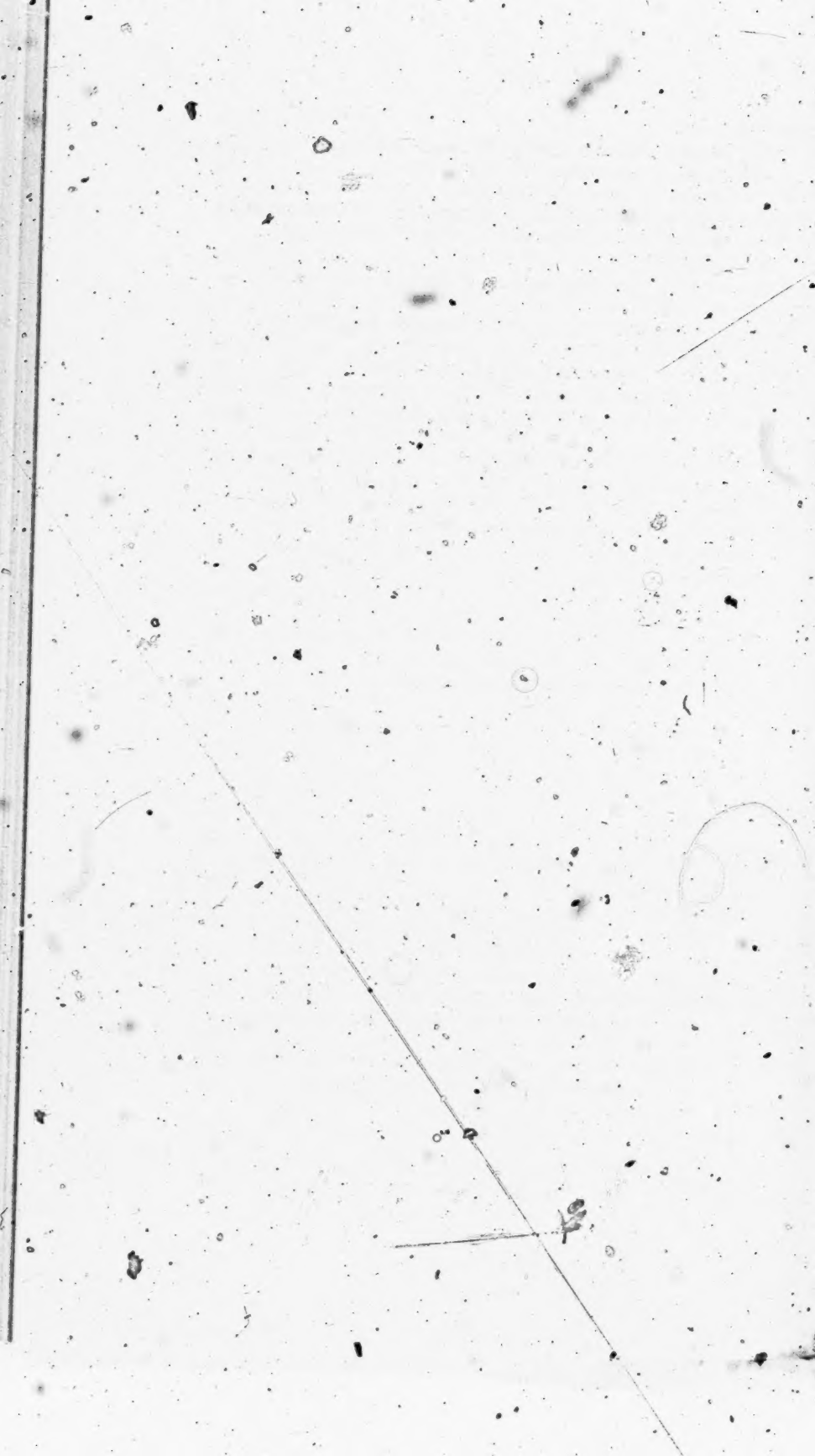

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OPINIONS BELOW

The opinions of the Court of Claims (R. 34–45) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1944 (R. 45). The petition for a writ of certiorari was filed September 5, 1944, and granted November 20, 1944. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288.

QUESTIONS PRESENTED

1. Whether article 15 of a standard form Government contract, which provides that the decision of the head of the department on all "disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the Government did not establish higher wage rates under the contract than those originally specified therein and that the contractor's payment of higher wages was not caused by acts of the Government.

2. Whether, if article 15 of the contract was intended to apply to such a finding, it could validly be agreed to by the parties.

3. Whether the Government, by inviting bids for the building of superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for constructing the foundations of the same buildings during an earlier period, thereby (1) established "different wage rates" under article 19 (a) of the foundation contract so as to entitle the contractor to an adjustment thereof, or (2) violated any implied obligation in respondents' contract.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra*, pp. 45–49.

STATEMENT

Respondents, who are engaged in the building construction business in Chicago, entered into a contract with the United States on November 26, 1935, to construct the foundations of the Jane Addams Houses, a Public Works Administration project in Chicago (Fdgs. 1, 2; R. 22). The work was duly completed on May 19, 1936 (Fdg. 18; R. 31).[1]

Article 18 of the contract and the related specifications required that employees engaged on the project be paid the minimum hourly wage rates set forth therein (Fdg. 5; R. 23), and the specifications provided that:

> "The Government will not consider any claims for additional compensation made by the Contractor because of payment * * * of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor." (Fdg. 5; R. 24.)

Article 19 of the contract, also referred to in the specifications, provided that the listed wage rates should be "subject to change by the Federal Emergency Administrator of Public Works," and that

[1] The work was to be completed within 75 calendar days after receipt of notice to proceed (*i. e.*, by February 23, 1936), but completion was delayed by various change orders and other causes for which extensions of time were granted by the United States (Fdg. 2, 9; R. 22, 25–26).

if the Administrator "establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor" (Fdg. 5; R. 24).

Respondents began work under the contract in December 1935 and paid the rates of wages set forth in the contract until sometime in February or March, 1936 (Fdg. 12; R. 27). On February 15, 1936, the Government issued an invitation for bids for the superstructures of the buildings for which respondents were constructing the foundations. That invitation specified minimum wage rates which were higher than those being paid to respondents' employees, who were unionized.[2] The Government did not request that respondents pay the higher rate of wages, but in February or March, 1936, the union of respondents' employees called a strike to compel respondents to pay wages equal to those specified for the superstructures, and respondents acceded to the union's demand for payment of the higher wage rates retroactively to January 8, 1936 (Fdg. 12; R. 27–28). The Government did not participate in

[2] The differences were as follows, in rates per hour (Fdgs. 5, 12; R. 23, 27):

	Foundations	Superstructure
Common laborers	$.50½	$.6[illegible]
Carpenters, cement finishers and hoisting engineers	1.31½	1.[illegible]

the negotiations between respondents and the strikers (Fdg. 13; R. 28).

Respondents claimed reimbursement for the increase in wages, and a dispute arose as to the right thereto, respondents contending *inter alia* that petitioner "had established higher wages on the project" (Fdg. 14; R. 28). Article 15 of the contract provides that all "disputes concerning questions arising under this contract [except labor disputes] shall be decided by the Contracting Officer * * *, subject to written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such question." (See *infra*, pp. 45–46.) The dispute as to the wage increase was duly submitted to the contracting officer, who rejected the wage claim (Fdg. 15; R. 28–29).[1] Respondents thereupon appealed to the Assistant Administrator of Public Works, who on June 29, 1936, ren-

[1] Other items of claim were also submitted for damages alleged to have resulted from the changes and delay caused by the Government. The contracting officer and the head of the department found that respondents were entitled to $8,743.42 therefor (Fdg. 15; R. 30). Petitioner and respondents stipulated below that respondents were entitled to recover $8,727.44 for all claims other than those resulting from wage increases, and that judgment might be entered for that amount (Fdg. 11; R. 27). Consequently, those parts of the findings below relating to delay and the damages occasioned thereby (especially Fdgs. 7–11; R. 24–27) are not material to the questions here involved.

dered a written decision with findings of fact, wherein he found that "the increase in wage rates was occasioned by no fault of the Government," and rejected the claim (Fdg. 16; R. 30). Respondents then petitioned the Federal Emergency Administrator of Public Works (the "head of the Department" under the contract, R. 20) to decide and allow the claim "as a part of the equitable adjustment under the contract" (Fdg. 17; R. 31). On May 20, 1937, in a letter to the Comptroller General, the Administrator rendered findings of fact and conclusions, disallowing the wage claim.[4] The Administrator found that "there were no fundamental changes in economic conditions as contemplated by Article 19 (a)" of the contract; that the minimum rates specified in the contract were in accordance with those set forth in an existing agreement between the Building Trade Employers' Association (of which re-

[4] The Assistant Administrator and the Administrator also found (Fdg. 16; R. 30; Fdg. 18; R. 32–33) that respondents had suspended work on the foundations, at the Government's request, from December 12, 1935, to February 17, 1936; that had respondents been permitted to work from December 12, 1935 (the first work day after the stop order) to January 8, 1936 (the date to which the increase in wage rates was made retroactive under respondents' agreement with the unions), respondents would have been able to obtain workers at the lower rates; and that as a result thereof the contractor incurred an extra expense of $909. The Administrator recommended that this sum be paid to respondents as "an item of damages against the Government" (R. 33), but payment was refused by the Comptroller General (R. 34).

spondents were members) and the unions in Chicago; and that the wages were increased, not by "the acts of the Government, in advertising for the superstructure contract" at higher wage rates, but because of the execution of a new wage agreement by respondents with the union after the contract with the Government was entered into (Fdg. 18; R. 31–34). The Comptroller General thereupon refused to authorize payment of the controverted item (R. 34) and respondents brought suit in the Court of Claims, charging that the P. W. A. had established "different wage rates by increasing the same" pursuant to Article 19 (a) of the contract, "as a result of which the plaintiffs were compelled to pay said increased rates" (R. 4, par. 9). That court entered judgment for respondents in the sum of $13,388.27.[1]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract the United

[1] The judgment for $13,388.27 consists of $4,660.83 as the excess wages paid, and $8,727.44 as the stipulated recovery on account of the changes and delays (see n. 3, p. 5, *supra*). Since in the Government's view the findings of the Administrator, allowing $909 for excess wages, were conclusive under article 15 of the contract, we challenge here only that part of the judgment which exceeds $9,636.44 (the stipulated $8,724.44, plus the $909 item).

States violated an express or implied obligation of that contract.

2. In rejecting administrative findings of fact that the increased wages paid by respondents were not caused by the invitation for bids, without determining that the administrative findings were arbitrary, capricious, or so grossly erroneous as to imply bad faith.

3. In holding that the administrative decision related to a question of law.

4. In holding that article 15 of the contract was not intended to make the decision of the head of the department final and conclusive with regard to "disputes concerning questions arising under" the contract when the disputes concern questions of law or involve possible breach of contract by the Government.

5. In holding that a contrary construction of article 15 would make that provision illegal.

6. In entering judgment for respondents for the increased wages paid by them.

SUMMARY OF ARGUMENT.

Article 15 of the contract here involved provides that the decision of the "head of the department" shall be "final and conclusive" with respect to all "disputes concerning questions arising under the contract." The instant dispute arose upon respondents' claim that by specifying higher minimum wage rates for the superstructures to be

erected after respondents had completed the foundations, the Government "established" higher wage rates under the contract, thereby creating a liability for reimbursement of the added cost. The claim was submitted to and rejected by the contracting officer and, upon appeal, by the "head of the department", who found that payment of the higher wages by respondents was occasioned not by any act of the Government but by a strike of respondents' employees and by respondents' yielding to their demands. This decision was entitled to finality under the terms of article 15, in the absence of a showing of arbitrariness or such gross error as to imply bad faith.

I

The court below treated article 15 as applicable solely to disputes of a factual nature. We submit that even under this view the instant dispute is included. The determination of whether a breach of contract has been committed is factual, and administrative determinations in analogous cases have been accorded finality. The underlying question of causation which is present in this case is at least a "mixed" question, the administrative determination of which is entitled to similar treatment.

Even if the question be viewed as one of law, the administrative determination should be regarded as final under article 15. Numerous de-

cisions of this Court have given effect to similar provisions as applied to questions of interpretation of contract. The submission of such disputes to administrative disposition does not, as the court below held, oust the courts of jurisdiction, but merely narrows the field of judicial inquiry. The decision below does not find support in the common law with respect to contracts to arbitrate or in Section 145 of the Judicial Code, conferring jurisdiction upon the Court of Claims.

The distinction between fact and law is, we submit, not relevant here, since the purpose of providing in a contract for administrative decisions clearly is to secure prompt determination of all questions. That purpose would be defeated by introducing concepts which are relevant elsewhere but have no proper application here.

II

Article 15 to one side, we submit that the action of the Government did not constitute a breach of either an express or an implied condition of respondents' contract. Article 19 (a) of the contract and paragraph 4 of section 12 of the specifications expressly apprised respondents that they would not be reimbursed for wage increases unless the Government established them under the contract. That no wage rates other than the original minimum rates were ever established for respondents is conclusively demonstrated by the fact that respondents were never obligated

to pay any higher wages than those listed in the contract. Since the findings of the court itself are that the Government "did not at any time expressly request [respondents] to pay higher wages" on their job, and did "not participate in the negotiations between [respondents] and the striking workmen," there is no justification for the conclusion that by prescribing higher wage scales for the superstructures to be erected after completion of respondents' contract, the Government established "different wage rates" on respondents' project.

The Government did not violate any implied obligation of respondents' contract by causing its performance to become more expensive. There is no hint that the Government desired or intended to bring about increased wages on respondents' job. The express terms of the contract and specifications place the burden of increased labor costs on the contractor save only when the Government establishes higher wage rates under the contract; and these provisions preclude importing an inconsistent implied obligation into the contract. In a legal sense, respondents' payment of higher wages resulted from their own new agreement with their employees, induced by a successful strike, and not from the action of the Government, which was justified in specifying different wages upon the superstructures.

ARGUMENT

Article 15 of the contract provides that "disputes concerning questions arising under this contract shall be decided by the Contracting Officer * * * subject to written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such questions." A dispute arose between the parties as to whether the Government, by prescribing higher minimum wage rates for the superstructures to be erected after this contract was completed, had established higher wages requiring reimbursement of the added cost under article 19 of the contract. This dispute was submitted by respondents to the contracting officer and his adverse decision was successively appealed to the Assistant Administrator and the Administrator, both of whom decided the dispute against respondents (R. 30, 32). But despite the express terms of article 15 of the contract the Court of Claims refused to hold the Administrator's "decision * * * final and conclusive upon the parties."

This disregard of the parties' antecedent stipulation was not rested upon the familiar exceptions to the finality of the administrative decision in such circumstances—i. e., arbitrariness, caprice, fraud, or such gross error as to imply bad faith. See R. 39; Cf. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *United States* v. *Gleason*, 175 U. S. 588,

602. It was instead based upon the conclusion that the parties did not mean what they appeared to say in article 15, and that, if they did, their agreement was to that extent illegal.[6] The majority of the court held that the Government's specification of higher minimum wages for the superstructures required respondents "as a necessary consequence" to pay higher wages on their job and was a breach of "an implied condition" of the contract to refrain from any act which would make respondents' performance more expensive; that article 15 of the contract was not intended to apply to questions of breach of contract; and that, if it were so intended, it was illegal and beyond the competence of the parties (R. 34–42). Two of the three judges in the majority[7] also ruled that the Government had indirectly "established" higher wage rates on respondents' job and was therefore "obligated to pay the increase under article 19", and that its action raised a question of breach of contract which article 15 did not and could not cover (R. 36).

[6] The exact holding of the Court of Claims is somewhat confused by the fact that several opinions were written. The case was decided in favor of respondents by three members of the court. Judge Whitaker delivered "the opinion of the court" (R. 34), in which Chief Justice Whaley alone concurred (R. 40), and Judge Madden wrote a separate concurring opinion (R. 40–42). Judge Littleton dissented (R. 42–45) and Judge Jones did not participate (R. 45).

[7] In the opinion by Judge Whitaker.

We submit that the decision below is erroneous, whether the dispute between the parties be regarded as involving a question of fact, a mixed question of law and fact, or a question of law; that the parties intended and had the right to enter into a binding agreement for the administrative settlement of all such disputes; and that the decision of the head of the department on the disputed question was accordingly final and conclusive on the parties. We further submit that, irrespective of article 15, the action of the Government in the instant case did not constitute a breach of either an express or an implied term of the contract.

I

ARTICLE 15 WAS INTENDED TO APPLY TO THE INSTANT DISPUTE

Article 15 of the contract makes "final and conclusive" the decision by the head of the department of "all * * * disputes concerning questions arising under this contract," except "labor issues" and "except as otherwise specifically provided in this contract" (R. 23; Appendix pp. 45–46, *infra*). Since it is not contended that either exception is pertinent,[8] the principal issue

[8] Nothing in the contract specifically excepts the instant dispute from article 15. "Labor issues" arising under the contract, which article 15 requires to be submitted to the head of the department if they "cannot be satisfactorily adjusted by the Contracting Officer", clearly embrace only issues between employer and employees.

here would seem to be whether the present dispute concerns any "questions arising under this contract." The findings of fact of the court below definitively answer this inquiry. The court found that a "dispute arose between the parties to the contract * * * as to reimbursement * * * for the additional wages," respondents contending that the Government "had established higher wages on the project" and asserting a right to reimbursement under the contract (R. 28–29); that this dispute was submitted to the contracting officer who rejected the claim (R. 28–29); and that on appeal the Administrator affirmed the rejection, making an express finding that wages had not been increased pursuant to article 19 (a) of the contract (R. 32).[9]

Both parties proceeded in the belief that article 15 prescribed the applicable administrative procedure, the dispute being submitted to and passed upon first by the contracting officer, then by the authorized representative of the head of the department (the Assistant Administrator), and finally by the head himself. Even if the broad language of article 15 admitted of alternative constructions, the meaning given to it by both parties would be dispositive. Williston, *Contracts* (rev. ed.) § 623; American Law Institute, *Restatement*

[9] The petition in the Court of Claims rests the right to reimbursement of excess wages upon article 19 (a), on the ground that the Government had "established" higher wage rates on the project (R. 4).

of Contracts, § 235 (e); *Pressed Steel Car Co.* v. *Union Pacific R. Co.*, 297 Fed. 788 (C. C. A. 2). The intention of the parties that article 15 should cover "all * * * disputes" under the contract not specifically excluded therefrom, whether those disputes related to questions of law or of fact, is further evidenced by a comparison of its language with that of article 9 of the same contract, relating to delay by the contractor, which makes the Administrator's decision final and conclusive only as to the "facts of delay" (R. 14).[10]

The dispute revolved about the casual relationship between the Government's prescription of higher wage rates in its invitation for bids for the superstructures and respondents' subsequent payment of like wages on the foundations, concededly without any request or direction to do so by the Government. Intervening between these two acts were a strike by the union of respondents' employees and a settlement thereof by agreement to pay the higher wages, following negotiations in which the Government concededly did not participate. The Assistant Administrator

[10] Article 15 in many other standard form government construction contracts is substantially the same as the instant article 15, except that it limits the finality of administrative decision to questions of fact. Such a contract was involved in *United States* v. *Callahan Walker*, 317 U. S. 56, 58. The form of government contract here involved is "U. S. Government Form P. W. A. 51" and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512, and *United States* v. *Blair*, 321 U. S. 730.

found that "the increase in wage rates was occasioned by no fault of the Government" (R. 30); and the Administrator found that it was not the acts of the Government but the signing of a new agreement with the union which was the cause of the wage increase (R. 32).[11] Hence the administrative determinations were addressed to questions coming within the plain language of article 15. That fact; the wording of the article and its interpretation by the parties, and judicial interpretation of similar provisions in other contracts (see *infra*, pp. 21–26) seem clearly to show that disputes of the character here involved were intended to be covered.

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[11] These findings, we submit, are inconsistent with Judge Madden's view (not joined in by the other members of the court) that the contracting officer never decided or "gave any consideration to" the sole question which he thought the court was called upon to decide—whether the Government broke an implied condition not to increase the contractor's cost of performance (R. 40). The findings of the administrative officers (R. 30, 32) were dispositive of the claim in whatever way it may be stated. Obviously the effect of article 15 cannot be evaded by couching the same claim in different legal terminology. Moreover, the administrative officers could only pass upon claims actually submitted, and here the findings of the administrative officers were responsive to the claim filed. If the "claim" changes its identity when presented in a different legal guise, then the respondents did not make a claim concerning the alleged breach of an implied condition of the contract and thus did not afford the contracting officer and the head of the department an opportunity to pass upon the matter administratively. This would bar them from asserting the claim in court. *United States* v. *Callahan Walker*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735.

II

ARTICLE 15 IS NOT ILLEGAL AS APPLIED TO THE INSTANT DISPUTE

The court below held that article 15 could validly apply only to "questions of fact arising as the work progressed" (R. 39), including the interpretation of the specifications, and could not be applied, even if so intended by the parties, to "the question of whether or not there has been a breach of the contract" (R. 37, 38, 39, 41). We submit that no matter whether the dispute be considered to involve article 19 of the contract or an implied obligation not to make performance more expensive, the parties could validly agree to submit it to final administrative decision. And this is so, in our view, whether the question be regarded as one of fact or as one of law in whole or in part.

A. THE DISPUTE RAISED A QUESTION OF FACT OR A MIXED QUESTION OF LAW AND FACT

The alternative issues of whether article 19 of the contract required that respondents be reimbursed for the increased wages which they paid or whether the Government committed a breach of contract by specifying higher wages upon the superstructures, constitute issues relating to performance and breach which, in an action at law, would be left to the jury. *Simmons* v. *Snow*, 275 U. S. 113; *Lincoln* v. *Orthwein*, 120 Fed. 880 (C. C. A. 5); *Nelson* v. *Chicago Mill & Lumber*

Corp., 76 F. (2d) 17, 23 (C. C. A. 8); *Crocker Chair Co.* v. *Hines Hardwood & H. Co.*, 201 Wis. 415, 230 N. W. 61. It follows that they should be regarded as issued upon which the administrative determination is final, even if finality under article 15 is limited to determinations of fact. See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 533–554; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Goltra* v. *Weeks*, 271 U. S. 536. The same conclusion results if the question be regarded as one of mixed fact and law. Cf. *United States* v. *Esnault-Pelterie*, 303 U. S. 26, 29. See also the decisions involving the conclusiveness of the determinations of statutory administrative bodies in *Gray* v. *Powell*, 314 U. S. 402, 411–414; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–185. The administrative determination of even such questions as the interpretation of clauses contained in a contract or specifications, as distinguished from merely the application of such provisions to particular fact situations, has been held to be conclusive under provisions similar to article 15 of the contract in the present case (see *United States* v. *McShain*, 308 U. S. 512, 520; *Plumley* v. *United States*, *supra*; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620); and the court below concedes that this is so (R. 39).

Underlying the issues of the Government's obligation to reimburse the respondents or, in the alternative, to pay damages for the breach of an implied obligation to refrain from rendering respondents' performance more expensive is a question of causation, namely, whether the Government's act in specifying higher wages upon the superstructures was the cause of the higher wages which respondents paid. As will be developed further below (see *infra*, pp. 39–43), we believe that this question was rightly determined administratively and wrongly decided below. At least some of the factors which must be taken into account in determining causation are, moreover, clearly factual. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469, 474; Green, *Judge and Jury* (1930) p. 191; Harper, *Torts* (1933) pp. 256–257. The Administrator's conclusion consequently turns upon at least a mixed question upon which his determination should be regarded as final.

B. ARTICLE 15 MAY VALIDLY APPLY EVEN IF THE DISPUTE BETWEEN THE PARTIES BE VIEWED AS INVOLVING A QUESTION OF LAW

The court below held that the parties could not validly stipulate that the decision of an administrative officer of the Government shall be final in the circumstances at bar, because

> leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the con-

> tract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld. (R. 38) [12]

We submit that the foregoing statement is out of line with previous decisions of this Court.

In *United States* v. *Gleason*, 175 U. S. 588, the dispute submitted to the contracting officer for decision under a provision similar to article 15 was whether the contractors' failure to complete the work on time was a "result of their own fault or of forces beyond their control" (175 U. S. at 604). This was in effect a determination of whether the contractors had broken their contract by completing the work late. In according finality to the contracting officer's decision, this Court said (at pp. 602, 604):

> Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or

[12] The court's statement that article 15 should be applied only to "questions of fact arising as the work progressed" (R. 39), is virtually identical with its position in *McShain* v. *United States*, 88 C. Cls. 284, 297 (reversed, *per curiam*, 308 U. S. 512, 520). There the court quoted the following dictum from its previous decision in *Davis* v. *United States*, 82 C. Cls. 334, 346: "But the competency of the parties to so stipulate, as the courts have many times pointed out, is limited to the decision of questions of fact arising under the contract * * * They are questions which the parties to a contract may properly submit to the determination of the contracting officer or head of the department and lawfully agree to be bound by his decision."

other officer, of all specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.

* * * * * *

* * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the *result of their own fault or of forces beyond their control* * * *. [Italics added.]

Goltra v. *Weeks*, 271 U. S. 536, is authority for the validity of a provision attaching even more drastic consequences to the decision of an administrative officer with respect to breach of a government contract. There, a lease of Government-owned vessels authorized the Secretary of War to terminate the lease if in his "judgment" there was "non-compliance" by the lessee with its provisions (271 U. S. at 540). The Secretary of War found that the lessee had not complied with the lease and accordingly terminated it. In a suit to enjoin the War Department from seizing the vessels, this Court held that the Secretary's determination was conclusive and not subject to judicial review, stating as follows (271 U. S. at 548):

> The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. * * * Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a vital issue under the contract is left to the decision of a government officer. *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeny* v. *United States*, 109 U. S. 618; *United States* v. *Gleason*, 175 U. S. 588; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *United States* v. *Henley*, 182 Fed. 776; *Martinsburg R. R. Co.* v. *March*, 114 U. S. 549.

To exclude from article 15 all disputes involving "breach of contract," as did the court below, would virtually emasculate that provision. In a sense, almost every dispute under a contract revolves about an alleged breach, for any claim may be predicated upon the express or implied contention that the contract does or does not authorize particular acts. Questions of "the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work", which the court conceded were properly covered by article 15 (R. 39), necessarily involve the scope of the rights and obligations created by the contract no less than the question at bar. A dispute similar to the

present one was involved in *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, in which the question was whether the contract required the contractor to do more work than he thought it did. The contract provided that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final." Upholding an administrative decision of the Supervising Architect (affirmed on appeal by the Secretary of the Treasury) that a certain number and type of underpinnings was required for buildings adjacent to the construction work, this Court stated (p. 393):

> If we may concede to appellant an ambiguity in the specifications * * * at the utmost it could only be said that there was ground for dispute, and under the contract the decisions of the Architect upon the dispute was final.

The court below thought that the contractor's obligation under article 15 to "proceed with the work as directed" during the determination of the dispute "negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to" (R. 39–40). But this was also the situation in *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed upon rehearing, 261 U. S. 610. There the contract provided that the contractor should be reimbursed for costs actually sustained "in con-

nection with said work,'" and that, if there was disagreement, "the decision of the contracting officer shall govern." The contracting officer decided that the premium on certain bonds, previously paid by the contractor, was a cost sustained "in connection with said work." The decision involved construction of the contract with reference to past events. The decision was held binding upon the United States, as it would have been upon the contractor had it gone the other way, and recovery of the amounts withheld was allowed.

In both the *Merrill-Ruckgaber* and the *Mason & Hanger* cases, as in the present case, the contention was advanced that the decision of the contracting officer was not conclusive because it involved a legal question and was beyond his competence. In each case the contention was rejected by this Court.[11] Many other decisions of this Court have given similiar effect to a provision such as that in article 15. See *Plumley* v. *United States*, 226 U. S. 545 (whether certain work required of the contractor was a "duly authorized change" under the contract, or whether the contract required payment of extra compensation); *Ripley* v. *United States*, 223 U. S. 695, 704

[11] See Brief for Appellant in No. 281, October Term, 1915, pp. 11, 14 (*Merrill-Ruckgaber*); Brief for the United States, pp. 17–18, Petition by the United States for Rehearing, pp. 15–26, and Brief for the United States on Rehearing, p. 7, in Nos. 121, 122, October Term, 1922 (*Mason & Hanger Co.*).

(whether the contractor's work complied with the specifications); *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553 (whether the contract called for greater compensation than the engineering officer determined to be due); *Kihlberg* v. *United States*, 97 U. S. 398 (whether distances "ascertained and fixed by the chief quartermaster" were conclusive in fixing the compensation of a contractor to transport supplies). Numerous decisions in the lower Federal courts, in state courts, and in the English courts are to the same effect.[14]

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[14] *Barker* v. *City of New York*, 242 Fed. 350 (C. C. A. 2); *North American Ry. Const. Co.* v. *R. E. McMath Surveying Co.*, 116 Fed. 169 (C. C. A. 7); *Handy* v. *Bliss*, 204 Mass. 513. The following cases hold similarly with reference to the decisions of third-party arbitrators: *Warner Construction Co.* v. *Louis Hanssen's Sons*, 20 F. (2d) 483 (C. C. A. 8); *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398, 404 (C. C. A. 6), cert. den., 214 U. S. 515; *Michigan Stone & Supply Co.* v. *Harris*, 81 Fed. 928, 931 (C. C. A. 6); *Deshon* v. *Scott's Adm.*, 202 Ky. 575; *Matter of Wilkins*, 169 N. Y. 494, 496; *Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 499; *Itoh & Co., Ltd.* v. *Boyer Oil Co.*, 198 App. Div. 881, 883-884; *Gerdetz* v. *Central Oregon Irr. Co.*, 83 Ore. 576; *Kingston Coal Co.* v. *Glen Alden Coal Co.*, 312 Pa. 546; *Ching* v. *Ching*, 6 Ves. Jr. 282, 31 Eng. Rep. 1052; *Young* v. *Walter*, 9 Ves. Jr. 364, 367, 32 Eng. Rep. 642, 644; *Steff* v. *Andrews*, 2 Madd. 6, 9, 56 Eng. Rep. 237, 238.

Some decisions exhibit a tendency to limit the scope of the submission by strict construction, stating that a power to interpret a contract or decide questions of law cannot be inferred but must be clearly stated, and a few of the older cases have carried this doctrine to questionable extremes. *E. g.*, *Gammino* v. *Inhabitants of Town of Dedham*, 164 Fed. 593.

Two of the three judges in the court below argued that article 15 would be illegal if taken to apply to the dispute in the present case, because it would be an invalid agreement to preclude recourse to courts and would, more specifically, conflict with Section 145 of the Judicial Code, 28 U. S. C. 250, conferring jurisdiction upon the Court of Claims to hear and determine claims against the United States "founded upon * * * any contract" (R. 37–39). The authorities relied upon to establish the invalidity of precluding resort to the courts are cases involving state statutes in which the attempt was made to prohibit resort to the Federal courts as a condition of doing business within the state, and cases in which contracts had been drawn to bar any resort whatever to the courts (R. 37–38). Neither factor is present here. The claimant is free to resort to the appropriate courts, without hindrance in the terms of the contract. The finality which is given to administrative decisions by article 15 results, of course, in narrowing the field of judicial inquiry (cf. *Gray* v. *Powell*, 314 U. S. 402, 411–413); but resort to the courts is not robbed of utility in proper cases since the administrative decision may be disregarded if it is arbitrary or capricious or so grossly erroneous as to imply bad faith (*supra*, p. 12). For the same reasons the conten-

600 (C. C. A. 1); *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8); *King Iron Bridge Co.* v. *St. Louis*, 43 Fed. 768 (C. C. E. D. Mo.), appeal dismissed, 149 U. S. 769.

tion that article 15 conflicts with Section 145 of the Judicial Code is unsound. The same contention was urged unsuccessfully in almost identical form by the contractor in *United States* v. *McShain*, 308 U. S. 512. (See Respondents' Brief in No. 43, October Term, 1939, pp. 9–10, 11–12). This contention ignores the obvious truth that a claim founded upon a contract must come within the contract as written. The jurisdictional statute neither adds to nor detracts from the terms which may be included in a contract with the Government, the legality of which necessarily turns upon other provisions of law. A claim which has been properly rejected pursuant to a valid contractual provision is not given life by Section 145.

It is said by the judges below that even "arbitration agreements not authorized by statute, leaving to arbitrators the final determination of whether * * *, there has been a breach of the contract, are illegal" (R. 38). Assuming that there is an analogy between article 15 and an arbitration agreement, the postulate must still be rejected that such an arbitration agreement is illegal. It was well established at common law that "controversies involving questions purely of law [may] be submitted to arbitration" and that "the decision of the arbitrators in respect thereto is binding, although contrary to law, unless fraud or corruption is imputable." *Deshon* v. *Scott's Adm.*, 202 Ky. 575, 579; 260 S. W. 355, 356.

See also *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120; *Burchell* v. *Marsh*, 17 How. 344; *Matter of Wilkins*, 169 N. Y. 494, 496; *Gerdetz* v. *Central Oregon Irr. Co.*, 83 Ore. 576; *Kingston Coal Co.* v. *Glen Alden Coal Co.*, 312 Pa. 546; *Ching* v. *Ching*, 6 Ves. Jr. 282, 31 Eng. Rep. 1052.[15]

The authorities relied upon below (R. 38–39), which hold that in the absence of statute (cf. United States Arbitration Act, 9 U. S. C. 1 *et seq.*) the courts will not compel specific performance of an agreement to arbitrate or give effect to such an agreement as a bar to an action, except where the agreement is plainly limited to the determination of an amount payable or other specific facts, extend no further than executory agreements to arbitrate.[16] See *Red Cross Line* v.

[15] At common law nothing could be done to correct errors of law made by the arbitrator. His decision was final and was unassailable in the absence of fraud or bias. *Mitchell* v. *De Schamps*, 13 Rich. Eq. 9, 23 (S. C. 1866); *Mayberry* v. *Mayberry*, 121 N. C. 248, 250, 28 S. E. 349. Under some statutes, also, arbitrators' decisions upon matters of law are final. *Deford* v. *Deford*, 116 Ind. 523, 19 N. E. 330. It has even been held that arbitrators may disregard statutory law. See *Darrow* v. *Braman*, 201 Mass. 469, 88 N. E. 5, where the arbitrator refused to consider the Statute of Frauds in making his award. Some statutes, however, specifically provide that the arbitrators must decide according to law. See statutes collected in Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934), 47 Harv. L. Rev. 590, 602–603, fn. 77, which also contains a general discussion of the duty of arbitrators to follow the law.

[16] The doctrine evidenced by these authorities has been condemned in scathing terms. See the classic opinion of Judge

Atlantic Fruit Co., 264 U. S. 109, 121; American Law Institute, *Restatement of Contracts*, Secs. 550, 551.[17] The well-settled rule is that if such an agreement is executed to the point of an award, it will be given effect. *Red Cross Line* v. *Atlantic Fruit Co., loc. cit. supra; Corbin* v. *Adams*, 76 Va. 58, 61. Here, respondents took full advantage of the provision in article 15 for administrative settlement of their dispute with the Government; the contracting officer made a decision; respondent appealed it to the Assistant Administrator and the Administrator; and both of these officials affirmed the decision. The "arbitration" provision has been executed and the court below erred in not giving it effect.

The Court of Claims thought that article 15 was even more vulnerable than an executory agreement to arbitrate because it left "the settlement of the dispute not to arbitrators but to an agent of one of the parties" to the contract, who would determine whether or not that party "had breached it" (R. 39). But the fact that the

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Hough in *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y.). See also Williston, *Contracts* (rev. ed.) § 1919. In light of the widespread adoption of statutes by which agreements to arbitrate are made specifically enforceable, it may be doubted whether the policies upon which the early decisions were based retain their force. See statutes collected in Phillips, *The Paradox in Arbitration Law* (1933), 46 Harv. L. Rev. 1258.

[17] See also *Tobey* v. *County of Bristol*, 23 Fed. Cas. No. 14065, pp. 1320–1321; *Greason* v. *Keteltas*, 17 N. Y. 491, 496.

determination of a breach of contract was entrusted by the contract to an agent of the United States was held not to deny conclusiveness to his decision in *Goltra* v. *Weeks, supra*. There this Court stated (271 U. S. at 548):

> Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. * * * He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive.

See also *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Choctaw & M. R. R. Co.* v. *Newton*, 140 Fed. 225, 232–233 (C. C. A. 8), certiorari denied, 202 U. S. 620; *Williams* v. *Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463.[18]

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[18] The observation in Judge Madden's concurring opinion that a decision by a contracting officer would be "meaningless" because that officer could make an award only for, but not against, the Government is unsound. The decision of the Government officer may be of considerable value to an aggrieved party seeking redress (see *United States* v. *Blair*, 321 U. S. 730, 737–738) and is often accorded finality even where the Government's fiscal agents refuse to accept it. See e. g., *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 325–326; *Comb Company* v. *United States*, 100 C. Cls. 240, 247. Here the Government concedes the finality of that part of the Administrator's decision which is adverse to it, notwithstanding the Comptroller General's disagreement with that portion. See p. 7, n. 5, *supra*.

In the light of the foregoing, we respectfully submit that article 15, construed to embrace the dispute in the instant case, was within the competence of the parties, and the administrative decision thereunder is entitled to finality.

C. DISTINCTIONS BETWEEN QUESTIONS OF FACT AND QUESTIONS OF LAW ARE IRRELEVANT TO ARTICLE 15

To this point we have discussed the application and validity of article 15 upon successive assumptions as to whether the dispute between the parties raised a question of fact, a "mixed question" of fact and law, or a pure question of law. For many years the Government and contractors have litigated in the Court of Claims and in this Court whether provisions substantively similar to article 15 apply to questions of law.[19] Although this question has been determined in the Court of Claims (*McShain* v. *United States*, 88 C. Cls. 284, 297; *Callahan Walker* v. *United States*, 95 C. Cls. 314, 327), it has not been expressly decided in this Court. Cf. *United States* v. *McShain*, 308 U. S. 512, 520; *United States* v. *Callahan Walker*, 317 U. S. 56, 60–61. We believe, however, that the objectives and policy of the Standard Form con-

[19] See Government's Brief in *United States* v. *McShain*, 308 U. S. 512, No. 43, October Term, 1939, pp. 10–17; respondents brief, pp. 9–12; Government's brief in Court of Claims in same case, No. 43084, pp. 52–56; plaintiff's brief, pp. 37–39; Government's brief in *United States* v. *Callahan Walker*, 317 U. S. 56, No. 65, October Term, 1942, pp. 20–34; respondent's brief, pp. 13–15.

tract provision in question render largely irrelevant such distinctions as whether the issue is one of fact, one of law, or a mixture of the two.

The obvious purpose of a provision such as article 15, which is inserted in construction contracts and other agreements involving detailed or complex subject matter is to provide an expeditious and satisfactory method of adjusting the numerous differences which may arise during performance and to minimize litigation. *Kihlberg v. United States,* 97 U. S. 398, 401. To make the operation of such a provision depend upon the legal category to which a court may assign the question raised by a dispute is drastically to limit its effectiveness. Courts, text writers, and attorneys have always differed over whether particular questions are factual, legal, or a combination of both. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944) 58 Harv. L. Rev. 70, and authorities cited; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact* (1944) 57 Harv. L. Rev. 753. Surely the contractor and the Government engineer should not be required to predict the decision which the court of last resort will reach as to the nature of a particular dispute, in order to forecast whether finality attaches to its administrative determination; nor should the matter be litigated in each instance. To import into government contract law as a mandatory re-

quirement, the categories which are employed in ascertaining the respective functions of juries and statutory administrative bodies and of courts would be both to conflict with the purpose of provisions such as article 15 and to introduce needless uncertainty into contractual affairs.

As we have shown (*supra*, pp. 30–31), the fact that the arbitrator chosen by the parties is a government officer has been held by this Court not to negative the validity of the stipulation. It should equally prove no bar to the construction for which we contend. Considerable safeguards attach to the decision of the head of a government department or agency, who is responsible to the Chief Executive and to the Congress, and the assumption must be that he will ordinarily decide controversies fairly and with due regard to the just rights of the contractor. Cf. *United States* v. *Blair*, 321 U. S. 730, 735. If in a given case there is a showing of partiality or bias, not only will the administrative findings not be accorded the stipulated finality (*United States* v. *Gleason*, 175 U. S. 588, 602), but compliance with the requirement that the dispute be submitted for administrative determination may be excused. *United States* v. *Blair*, *supra*, 736–737. Abuse may thus be prevented or overcome.

To impose restrictions, otherwise than by statute, upon the terms which may be embodied in government contracts with reference to the ad-

justment of disputes, would constitute a drastic departure from previously understood law and would largely defeat the purpose of expeditious disposition of claims. We contend, therefore, that article 15 should be given its plain meaning without introduction by judicial decision of the difficult distinctions between fact and law which have arisen in dissimilar contexts, here largely irrelevant.

III

THE GOVERNMENT DID NOT COMMIT A BREACH OF ITS CONTRACT WITH RESPONDENTS.

Contrary to the determination of the Administrator, the court below decided that the Government was responsible for the increase in respondents' wage rates and was liable for the excess cost. This decision was based upon two grounds: (1) that the Government had "in fact established different wage rates on [respondents'] job, and, therefore, it is obligated to pay the increase under article 19" of the contract (R. 36, the view of two of the three judges in the majority); and (2) that, in any event, the Government is liable for the increased wages because its action constituted a breach of an implied obligation not to render respondents' performance more expensive (R. 36–37, 40, the view of all three judges). If we are correct in our position that the administrative ruling to the contrary is

not subject to judicial review, the present inquiry is at an end. However, we submit that, irrespective of this consideration, the administrative determination was correct.

A. THE GOVERNMENT DID NOT ESTABLISH "DIFFERENT WAGE RATES" COMPENSABLE UNDER ARTICLE 19 (a)

Article 19 (a) of the contract (*infra*, p. 47) provided that the "wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works", and that in "the event" the Administration "establishes different wage rates, the contract price shall be adjusted accordingly." The specifications (*infra*, pp. 48–49) set forth minimum wage rates for the different classes of employees and provided that those rates should be subject to review and adjustment by the Administrator, as provided in article 19 (a) of the contract; but it expressly stated that "The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor". Finding that the Government "did not at any time expressly request [respondents] to pay higher wages" (Fdg. 12, R. 27), two members of the

court below nevertheless held that the Government "in fact" had "established different wage rates on [respondents'] job" since payment of the higher wages by respondents "was the necessary consequence" of the Government's prescription of higher minimum wages in its invitation for bids for the superstructures (R. 36). This inference, we submit, disregarded the applicable provisions of the contract and specifications and could not properly be drawn from the record.

It is well known that, as the court below stated (R. 35), the purpose of the Public Works program, as part of which the instant contract was negotiated, was to relieve the wide-spread unemployment prevailing during the depression of the 1930's. The requirement in Public Works contracts for the payment of minimum wage rates [20] was imposed to protect workers by assuring that they would receive wages sufficient for a decent standard of living. To take care of possible fluctuations in the cost of living during the performance of these contracts, article 19 of the standard form provided that the wage rates fixed in the specifications were subject to change by the Government, with an adjustment of the contract price

[20] It is not questioned that the wage rates fixed in the specifications were minimum wages only. The Instructions to Bidders specifically stated that respondents should pay their employees "not less than the hourly wage rate" for each occupation listed (Fdg. 5, R. 23).

if higher rates were established. "Its manifest purpose was to protect labor so that in the event changing conditions made it advisable [the Administrator] might increase the minimum requirements in order that labor should be assured a proper wage." *Le Veque* v. *United States*, 96 C. Cls. 250, 253.

There was no establishment of higher wages under article 19 of the contract unless the Government could have required respondents to pay their employees the higher rates fixed for the superstructures. The only way that such a requirement could have been imposed would have been by an explicit change of the rates fixed by the specifications, and no such change was made. The respondents, correlatively, were not entitled to increased compensation under article 19. The rights of the parties were fixed by paragraph 4 of section 12 of the specifications, *infra*, p. 49, which expressly notified the contractor that he would not be reimbursed for wage increases in the absence of a corresponding increase in the rates fixed in the specifications, and that all wage disputes would have to be "adjusted" by him. In the face of this provision, respondents clearly cannot now recover pursuant to the contract's express provisions.

B. THE GOVERNMENT DID NOT VIOLATE AN IMPLIED CONDITION OF THE CONTRACT

Invoking the rule that "it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance,"[21] the court below held that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract, the Government violated its duty[22] (R. 36–37). The application of this rule of law to the present case assumes that the Government caused the wage increase. The Government's action, however, did not create a situation in which workers were called upon to work on the same project at

[21] An example of the rule and of the limitation upon it is stated as follows: A contracts to sell and B to buy in the future a large quantity of Georgia pine. Before the time for performance, B makes large purchases of Georgia pine from other parties, thereby making it more difficult for A to fulfill his contract. B has not committed a breach of contract. Risk of such hindrance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market, or otherwise hinder performance in ways or for purposes not within the risk assumed, he would have committed a breach. American Law Institute, *Restatement of Contracts*, § 315, illustration 3.

[22] Granted that the rule is correct, the court below disregarded the obvious limitation upon it, that it has no application where the terms of the contract or the surrounding circumstances are such as to show that the risk of increased cost of performance was assumed or anticipated by the parties. *Restatement of Contracts*, § 315 (1) (b); Williston, *Contracts* (rev. ed.) § 1293A; *Iron Trade Products Co. v. Wilkoff*, 272 Pa. 172, 116 Atl. 150.

the same time at different rates of wages. The Building Trade Employers' Association of Chicago, of which respondents were a member (R. 22), had an agreement with the construction unions in Chicago for the same minimum wage rates as those specified in respondents' contract. This agreement was in effect when the contract was made and was not to expire until May 31, 1936, three months after the job was originally scheduled to be finished and 12 days after it was actually completed (Fdg. 18, 19; R. 31–34).[23] It was necessary that the Government call for bids and enter into a contract for the superstructures in advance, so that work upon them could commence without delay immediately after respondents completed the foundations; but the increased wage rates specified therein were not to take effect until after respondents' contract was completed. There was no conflict between the two sets of wage rates and no hint that the Government desired or intended to bring about increased labor costs on the respondents' job. It would normally and reasonably be expected that the union would adhere to its agreement until its expiration. The union struck, however; and, as Judge Littleton

[23] This also appears from respondents' brief in the court below which states (p. 57): "The record is conclusive that the rates provided for in the specification of the foundations were the rates prevailing in Chicago at the time, and that these rates remained in force on work other than P. W. A. projects until May 31, 1936."

stated in his dissent, the increase in wages came about as "a direct result" of the employees' demand and the strike. (R. 43.) The increase was not a "necessary consequence" of the Government's specification of higher wages upon the superstructures. In the words of the dissenting judge (R. 43):

> The fact that the labor unions of the Chicago territory may have failed to abide by their wage agreement with the Building Trade Employers' Association, * * * cannot be made the basis of a claim for reimbursement against the Government.[24]

Certainly it cannot be contended that the Government was under a general duty not to fix dif-

[24] Respondents, in their brief in opposition to the petition for a writ of certiorari (pp. 19–20), argue that the "sole reason" for the statement of the head of the department "that the government did not increase the wages the respondents were required to pay was based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated on January 1, 1936, and that thereafter higher rates were to be established. * * * The only evidence in the case is that the agreement did not terminate until May 31, 1936, long after the contract was originally due for completion, and that the scale of wages announced for the superstructures was higher than the scale prevailing on private jobs." The fact that the head of the department incorrectly concluded that the agreement expired January 1, 1936, is not significant. Under the agreement actually in effect, respondents were more largely protected against a rise in wages than the Administrator supposed, and the employees' response to the Government's announcement was correspondingly more unusual.

ferent wages on the superstructures from those prescribed for the earlier work on the foundations. The very purpose of the project, as well as the inevitable need of adjustment to changing circumstances, would be inconsistent with such an obligation. Cf. *Le Veque* v. *United States*, 96 C. Cls. 250; *Dravo Corp.* v. *United States*, 93 C. Cls. 734, 758. There is nothing in the present contract or in the surrounding circumstances which gave rise to an obligation to freeze wages on Public Works projects in the vicinity, or even on later stages of the same building, at the level fixed for respondents. Article 19 and the provisions of the specifications discussed above (pp. 36–37), in dealing expressly with the subject of increased wages, exclude the implication of reimbursement for higher wages established in any other manner and clearly place upon the contractor the risk of changes which occur because of general market forces, whether or not the Government is a factor in the market, so long as the Government proceeds legitimately. A privilege, analogous to that of the trader who causes loss to another in the legitimate pursuit of business, may well be said to attach to the acts of the Government here. Cf. American Law Institute, *Restatement of Torts*, §§ 10, 708, 709; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479; *supra*, p. 39, n. 21.

It may be conceded that the Government's act of specifying higher wages in calling for bids for

the superstructures was in one sense a factor in bringing about the situation which caused higher wages to be paid by respondents.[25] It does not follow, however, that the "legal cause" of the higher wages was the Government's action. For such cause to arise it is necessary that "the law regard * * * it [as] just to hold" the actor responsible. American Law Institute, *Restatement of Torts*, § 9. Cf. Green, *Judge and Jury* (1930), pp. 196–222. Aside from justification afforded by the public purposes which, as has just been noted, the Government undertook to serve, the action of the employees and the union in striking for higher wages introduced an intervening factor which broke the chain of legal causation between the Government's act and the added cost to the respondents. American Law Institute, *Restatement, supra* §§ 440, 441, 448; Harper, *Torts* (1933), §§ 124, 128. The existence of a union wage agreement supposed to remain in effect until May 31, 1936, deprives the strike for higher wages of that reasonable foreseeability of consequences which is requisite to found a recovery of damages for breach of contract. See American Law Institute, *Restatement of Contracts*, § 330.

[25] The court below put the matter in "but for" form by stating that the workers would not have struck except for the Government's action. (R. 36.)

CONCLUSION

For the reasons stated we respectfully submit that the judgment below is erroneous and should be reversed.

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JANUARY 1945

APPENDIX

CONTRACT PROVISIONS

ART. 3. *Changes.*—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

* * * * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as

otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

* * * * * *

ART. 18. *Wages.*—(a) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this contract, it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall be paid an hourly, weekly, or monthly rate of wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand.

All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

(b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract."

SPECIFICATIONS

Paragraph 1 of Section 12 of Division I of the specifications provided that:

> Subject to the specification, general conditions and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *

Carpenters	$1.3125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	.85

Paragraph 2 of Section 12, *supra,* provided, that:

> The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract.

Paragraph 4 of Section 12, *supra,* provided that:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

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